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Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

No. 00-1746

In The

Supreme Court of the United States

SHERRY THURMOND, et al.,

Petitioners,

v.

DANIEL DELLA-CALCE, Lieutenant, individually and in his official capacity as a lieutenant with the City of Huntsville Police Department,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

1. Whether, in a case brought pursuant to 42 U.S.C. § 1983 alleging a use of excessive force in violation of the Fourth Amendment, a police officer is entitled to qualified immunity where no controlling, pre-existing, and factually-similar case law prohibited the challenged use of force, and where the challenged use of force was not so obviously violative of the Fourth Amendment that the unlawfulness of the conduct should have been readily apparent to the police officer even without such case law?

2. Whether the Eleventh Circuit correctly found that respondent was entitled to qualified immunity with respect to the excessive force claims of petitioners where the challenged use of force, which consisted solely of an order by respondent to a police riot squad under his command to march forward in "swinging baton" mode in an effort to disperse a crowd of 800 to 1200 strikers and which resulted in petitioners who were participants in the strike being struck with batons when they failed to move out of the way, did not violate any "clearly established" Fourth Amendment law?

LIST OF PARTIES

Petitioners

Sherry Thurmond
Levon Hall
Ronnie Hopper
David Rollins
Larry Thompson

Respondent

Lieutenant Daniel Della-Calce

(Officer Tommy Mayo, Officer Mike Culbreath, and Officer Paul Jones were also parties to the interlocutory appeal in the Eleventh Circuit below, but the petition for writ of certiorari before this Court does not involve any claims against these individuals).

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STATEMENT OF THE CASE

The Eleventh Circuit's decision below contains a sufficient summary of the material facts so as to enable the Court to properly evaluate whether this case is appropriate for certiorari review. (*See* Petitioner's App. A, pp. 2a-3a, 7a). Thus, respondent Lieutenant Daniel Della-Calce does not believe that any useful purpose would be served, at least not at this juncture, by supplying the Court with his own, perhaps more detailed, recitation of the underlying events and circumstances giving rise to this litigation. However, there are several misstatements of fact set forth in the petition for writ of certiorari which cannot be completely ignored. Consequently, in order to avoid any waiver of his opportunity to challenge these factual misstatements, Lieutenant Della-Calce will briefly address them below.

1. After correctly stating that "numerous" incidents of violence occurred at the site of the strike upon the arrival of the Mobile Field Force ("MFF"), petitioners assert that "[n]one of the destructive activity occurred near Petitioners and Petitioners were never accused of engaging in such activity." (Petition, pp. 3-4). Lieutenant Della-Calce challenges these latter factual assertions to the extent that they erroneously imply that he knew or was capable of knowing (a) where petitioners were located within the crowd of 800 to 1200 strikers at the time the violent acts occurred; and (b) whether petitioners, at the time they later emerged from the crowd and positioned themselves directly in the pathway of the marching MFF, had engaged in those earlier acts of violence and therefore represented a potential threat to the MFF.

2. Petitioners assert that the "crowd [of strikers] began to disperse" after Lieutenant Della-Calce declared the strike to be an unlawful assembly and read the dispersal order over a bullhorn. (Petition, p. 4). Petitioners also assert that the strikers "compli[ed]" with Lieutenant Della-Calce's dispersal order. (*Id.*). Lieutenant Della-Calce challenges these factual assertions because the evidence in the record shows that, after he gave the dispersal order, only some of the strikers began to leave but that a majority of them refused to disperse. (*See* R-89-2, Ex. AA, p. 6; R-89-3, Ex. HH, p. 2; R-89-1, Ex. I, pp. 173, 178; R-89-1, Ex. C, pp. 66-67; *see also* Petitioner's App. A, p. 7a).

3. Petitioners assert that, as the MFF marched forward toward the crowd of strikers in "tapping shield" mode, petitioners Thurmond; Hall, and Hopper, rather than leaving the area as ordered, positioned themselves in the pathway of the marching MFF "in an act of passive resist[a]nce." (Petition, p. 5). Petitioners further imply that the other two petitioners, Thompson and Rollins, by "join[ing]" their fellow strikers in the roadway as the MFF approached, were likewise engaged in an act of passive resistance. (*Id.*). Lieutenant Della-Calce challenges these factual assertions to the extent that they erroneously imply (a) that he knew or was capable of knowing the purpose of petitioners' actions or their motives in disregarding his dispersal order and positioning themselves in the pathway of the MFF; (b) that he believed petitioners were passive when they emerged from the crowd; and (c) that he expected petitioners to be passive when the MFF reached their position in the roadway.

4. Petitioners assert that "[a]t no time during or prior to the acts at issue were the demonstrators, either at the main gate or elsewhere at the Dunlop plant, aggressive or violent towards the Huntsville Police Department." (Petition, p. 5). Lieutenant Della-Calce challenges this factual assertion because the evidence in the record shows that the crowd of strikers engaged in acts of violence directed toward the MFF. Indeed, the following uncontradicted deposition testimony of Lieutenant Della-Calce, for example, conclusively establishes that objects were in fact thrown or sling-shot at the MFF during the entire time of its deployment:

> Q: Would you not agree with me that there was an entire group of people – the group of people that was closest to the mobile field force that were not engaging in illegal activities?
>
> A: They begin [sic] engaging in illegal activity that moment it was declared an unlawful assembly.
>
> Q: Other than the fact that the three plaintiffs –
>
> A: Sir, if I can make this easier on you I can't see where marbles are shot out of a sling shot from. I can't tell if it was those people immediately in front. It could have been three people back from the very front there that shot marbles. I have no idea.
>
> Q: So, are you saying you were shot by marbles?
>
> A: I was hit by something shot. It hit me hard enough to dent the mask I was wearing.

> Q: But you don't know if that happened – you don't know when that happened, right?
>
> A: No, sir.
>
> Q: Do you have any recollection as to when it happened other than sometime during the deployment of the mobile field force?
>
> A: No, sir. As I told you. From the time we started to the time we ended I'm sure I got hit by six or seven objects and things were hitting all around me. I don't know when these objects were thrown or shot.

(R1-89-1, Ex. I, pp. 167-168; *see also* R1-97-1, Ex. 21, pp. 145-148, 448-449, 453).

5. Petitioners repeatedly assert that, while positioned in the roadway, they were "overrun[ ]" by the MFF. (Petition, p. 6). Lieutenant Della-Calce challenges this factual assertion because the evidence in the record shows that at all material times (a) the MFF was marching slow enough so as to afford petitioners a sufficient amount of time to leave the area if they had chosen to do so before it reached their position in the roadway (*see* R-89-1, Ex. B, pp. 105-106, 154-155; R-89-1, Ex. C, p. 77; R-89-1, Ex. D, pp. 77-78); and (b) upon reaching petitioners' position in the roadway, the MFF continued to slowly march forward at a half-step pace through and past petitioners Thurmond, Hall, and Hopper (*see* R-89-2, Ex. W, Tape Counter 00:14:25-00:14:47, 00:16:49-00:17:54; R-89-2, Ex. X, Tape Counter 00:04:25-00:06:30; R-89-2, Ex. Y, Tape Counter 1:13:45-1:14:15; R-89-1, Ex. D, p. 83).

6. Petitioners assert that the MFF was "trained to strike all demonstrators, passive or not" while marching

in "swinging baton" mode. (Petition, p. 7). Lieutenant Della-Calce challenges this factual assertion because it seriously mischaracterizes the evidence in the record regarding the manner in which the MFF was actually trained to deal with passive resisters while in "swinging baton" mode. There are at least three items of evidence which are noteworthy here.

First, the following excerpts from the voluminous deposition testimony of Lieutenant Della-Calce aptly demonstrate that the MFF front line officers were *not* trained to strike all persons regardless of whether strikes were justified while marching in "swinging baton" mode, but, rather, they were specifically trained to walk around and past any passive resistors without striking them and let the MFF arrest team officers, who were positioned immediately behind the MFF front line officers, effect the arrests of these persons:

> Q: And you trained your officers to hit the plaintiffs in the situation that they were presented with in this case, right?
>
> A: No, sir. No, sir. If they were sitting and not causing any trouble, the officers were to go around them and the arrest team would arrest them as they go through the line.

(R1-97-1, Ex. 21, pp. 127-128).

> Q: You realized, didn't you, when you did not stop the line and allowed it to continue marching forward with batons swinging outward, that the plaintiffs would get hit by a baton?
>
> A: No, sir.

Q: So what did you believe would happen when you did not stop the line and pursuant to your order they were swinging batons outward and they came into contact with the five plaintiffs?

A: What I thought would happen at the time they came into contact with – how many did you say, with three?

Q: There are five plaintiffs.

A: Okay. Those plaintiffs that were standing up or whoever was standing up in front of the line, would be hit by a baton.

Q: What about those sitting on the ground?

A: The line was – should have passed by those people. Under normal circumstances gone right around them and the arrest team would have arrested them once they were behind the line.

Q: So you claim that you trained the folks on the front line not to hit people sitting on the ground.

A: That's correct.

(R1-97-1, Ex. 21, pp. 130-132).

Q: What are they supposed – what are they supposed to – you're saying you don't expect these people sitting on the ground to get hit when the officers with batons come at them?

A: That's correct.

Q: And what did you – exactly did you train the folks to do in this situation?

A: To move on through them.

Q: Just walk past them. Not hit them?

A: That's correct.

(R1-97-1, Ex. 21, pp. 138-139).

Q: Is the mobile field force trained when it's in three blast mode of swinging out batons to walk around people?

A: Yes, sir.

Q: So the officers are supposed to know if there is passive resistors in front of them even though they are swinging their baton in a low arc waist level or lower, that they're not supposed to hit the passive resistors in front of them and they're supposed to stop swinging and side step around the passive resistors?

A: Not necessarily.

Q: Well, what are they supposed to know to do? What are they trained to do when they're in three blast mode of swinging their batons outward in a waist level or lower arc when they come on a passive resistor?

A: They're trained to go around the passive resistors.

(R1-97-1, Ex. 21, pp. 350-351).

Q: Was there any training at all provided by either you or Lieutenant Bryant or anybody else as to what officers on the front line in three blast mode, swinging their baton waist level of lower in an outward motion

are supposed to do when they come upon somebody sitting in front of them?

[Objection]

A: I have explained this as many times as I could. They were taught to go around passive resistors.

(R1-97-1, Ex. 21, p. 354).

Second, the deposition testimony of Captain Kinney Bryant, who was the commander of the MFF immediately prior to Lieutenant Della-Calce, is entirely consistent with that of Lieutenant Della-Calce, as he too confirmed that the MFF was *not* trained to hit passive resistors even while marching in "swinging baton" mode:

Q: Can we agree that as you trained the mobile field force [the "swinging baton"] technique was only used to drive a crowd back and was not used as a means of dealing with passive resistors?

A: I never trained them to strike a passive resistor.

(R1-98-2, Ex. 45, pp. 53-53).

Q: The mobile field force is in swinging baton mode, right?

A: Yes, sir.

Q: Their job as they're trained is to use that to drive people back?

A: Yes, sir.

Q: They got to drive – they're supposed to drive those people back even if those people are actually using any force towards the front line?

A: They were not trained to hit anyone that was a passive resistor.

Q: Well, are you going to blame the individual officer on the front line who has always been using the swinging baton technique to drive people back if he continues to use that technique, even though the person is standing up or sitting down in front of them?

A: Technique was not used to hit a passive resistor if they are passive.

(R1-98-2, Ex. 45, p. 58).

Q: In fact, because you expect your officers to act as they're trained, you would expect those passive resistors to be struck?

A: No, sir. In fact, I really wouldn't because they're also trained not to hit a passive person.

(R1-98-2, Ex. 45, p. 64).

Third, the training records of Lieutenant Della-Calce and the three MFF front line officers who are alleged in this case to have actually struck petitioners (*i.e.*, Officer Tommy Mayo, Officer Paul Jones, and Officer Mike Culbreath) clearly show that each of these police officers were specifically trained *not* to hit a passive resistor with a police baton. (*See* R-89-2, Ex. V, ¶¶ 5-6, Tabs 1-4, #18; *see also* Petitioner's App. B, p. 20a at n. 6).

ARGUMENT

I. Certiorari Review Of The Eleventh Circuit's Qualified Immunity Ruling Below Is Unnecessary In Light Of This Court's Very Recent Decision In *Saucier v. Katz.*

Subsequent to the filing of the petition for writ of certiorari in this case, this Court decided *Saucier v. Katz*, 2001 WL 672265 (U.S., June 18, 2001), a case bearing a striking factual resemblance to this one insofar as it too involved an excessive force claim by a protestor arising out of a crowded event.[1] But even more important than the factual similarities which exist, the *Saucier* decision is significant because the Court disposed of the protestor's excessive force claim by applying virtually the same qualified immunity principles that doomed petitioners' excessive claims in the Eleventh Circuit below. Indeed, just as the Eleventh Circuit found that petitioners failed to carry their burden of showing a violation of "clearly established" Fourth Amendment law by pointing to controlling, pre-existing, and factually-similar case law which prohibited Lieutenant Della-Calce's "swinging baton" order, *see* Petitioner's App. A at pp. 5a-6a,[2] this Court in

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[1] In *Saucier*, the protestor specifically claimed that a military officer had engaged in excessive force by "half-dragging" him from a public event while he was demonstrating against animal cruelty, and thereafter by "shov[ing] or throw[ing]" him into a military van despite his alleged lack of resistance. *Saucier*, 2001 WL 672265 *3.

[2] The Eleventh Circuit actually went one analytical step further in reaching its conclusion that petitioners' excessive force claims were barred by qualified immunity. That is, upon initially concluding that no "clearly established" law violation

Saucier likewise found that the protestor could not prove that any "clearly established" case law prohibited what the military officer had done. More specifically, in finding that the military officer was entitled to qualified immunity, this Court stated:

> In the circumstances presented to t[he] [military] officer,. . . . neither [the protestor] nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the [military] officer from acting as he did, nor are we aware of any such rule. . . . On these

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had been proven because there was no controlling, pre-existing, and factually-similar case law which proscribed Lieutenant Della-Calce's "swinging baton" order, the Eleventh Circuit next proceeded to analyze, consistent with its previous decision in *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), whether Lieutenant Della-Calce's conduct fell within the exception to the rule requiring proof of a "clearly established" law violation. More specifically, the Eleventh Circuit examined whether Lieutenant Della-Calce should nevertheless be denied qualified immunity because his conduct "was so far beyond the hazy border between excessive and acceptable force that [he] had to know he was violating the Constitution even without case law on point." (Petitioner's App. A, p. 6a) (quoting *Mattox*, 127 F.3d at 1419). Applying this test, the Eleventh Circuit ultimately ruled that the exception did not apply and thus Lieutenant Della-Calce was entitled to qualified immunity because it found that Lieutenant Della-Calce's conduct was not "so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness was readily apparent to [him]." (*Id.*) (alteration in original). It was only after concluding that the *Mattox* exception did not apply that the Eleventh Circuit finally determined that Lieutenant Della-Calce was protected by qualified immunity. The *Saucier* opinion does not expressly reveal whether the Court looked beyond the relevant case law in evaluating the military officer's entitlement to qualified immunity.

> premises, [the military officer] was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.

Saucier, 2001 WL 672265 at *10. Thus, put simply, because the Eleventh Circuit's qualified immunity ruling in favor of Lieutenant Della-Calce is wholly consistent with this Court's most recent interpretation and application of the qualified immunity defense in *Saucier*, it is unnecessary for the Court to grant certiorari in this case.[3]

II. The Eleventh Circuit's Qualified Immunity Jurisprudence Does Not Conflict With This Court's Decisions in *Anderson v. Creighton* and *United States v. Lanier*.

The primary argument raised in the petition for writ of certiorari is that the Eleventh Circuit's qualified immunity jurisprudence conflicts with this Court's holdings in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and *United States v. Lanier*, 520 U.S. 259, 267, 269 (1997). (*See* Petition, pp. 13, 18, 20-21). Specifically, petitioners seem to argue that the Eleventh Circuit allows a public official to be protected by qualified immunity whenever there is no

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[3] Notably, prior to filing their petition for writ of certiorari in this case, petitioners openly recognized the possibility that this Court's ultimate decision in *Saucier* might render their petition "improvident." (*See* Petitioner's Application for Extension of Time to File Petition, April 13, 2001, p. 4). Without question, that possibility has now ripened into a concrete actuality, as the holding in *Saucier* implicitly reaffirms the correctness of the Eleventh Circuit's qualified immunity ruling below.

controlling, pre-existing, and factually-similar case law specifically prohibiting the challenged conduct. It is further argued that, as a consequence, the Eleventh Circuit has elevated the "clearly established" law inquiry to a level of specificity and rigidity that runs afoul of *Anderson* and *Lanier*, which hold that qualified immunity can be lost, even in the absence of binding precedent, if the plaintiff can show that the unlawfulness of the challenged conduct should have been apparent to the public official in light of pre-existing law. *Anderson*, 483 U.S. at 640; *Lanier*, 520 U.S. at 271. As demonstrated below, these arguments clearly lack merit, and, therefore, the Court should not grant certiorari on this basis.

Contrary to petitioners' assertions, there is no material conflict between the Eleventh Circuit's qualified immunity jurisprudence and this Court's holdings in *Anderson* or *Lanier*. Although it is true that the Eleventh Circuit generally requires a plaintiff to prove that controlling, pre-existing, and factually-similar case law prohibited the challenged conduct in order to overcome a qualified immunity defense, *see Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 (11th Cir. 1997) (*en banc*); *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (*en banc*), this is not always the case. Indeed, as briefly discussed above,[4] the Eleventh Circuit, in *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), recognized an exception to this general rule, pursuant to which a plaintiff can defeat a qualified immunity defense, despite being unable to point to relevant precedent, if the plaintiff can show that the "[public] official's conduct lies

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[4] *See* discussion *supra*, note 2.

so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the [public] official, notwithstanding the lack of caselaw." *Mattox*, 127 F.3d at 1419.[5] Stated another way, to trigger the *Mattox* exception, the plaintiff "must show that [the public official's] conduct was so far beyond the hazy border between excessive force and acceptable force that [the police officer] had to know he was violating the Constitution even without caselaw on point." *Mattox*, 127 F.3d 1419.

As can readily be seen, the Eleventh Circuit's qualified immunity jurisprudence does not blanketly require a plaintiff to always point to controlling, pre-existing, and factually-similar case law in order to defeat a qualified immunity defense. On the contrary, in situations where no relevant precedent exists, the Eleventh Circuit nevertheless allows a plaintiff, per the *Mattox* exception, to overcome a qualified immunity defense by showing that the challenged conduct was so obviously violative of federal law that the unlawfulness of the conduct should have been readily apparent to the public official without clarifying case law. Therefore, by incorporating the *Mattox* exception into its analysis, the Eleventh Circuit's approach to resolving claims of qualified immunity is

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[5] Significantly, in recognizing the *Mattox* exception, the Eleventh Circuit cited to *Lanier* and *Anderson* as authority. *Mattox*, 127 F.3d at 1419 n. 9; *see also Priester v. City of Riviera Beach, Florida*, 208 F.3d 919, 926-927 (11th Cir. 2000) (reaffirming the exception recognized in *Mattox* and citing to *Lanier* as authority for same). This further undercuts any suggestion by petitioners that the Eleventh Circuit has ignored this Court's qualified immunity precedents.

wholly consistent with the teachings of *Anderson* and *Lanier*.

CONCLUSION

Petitioners have not presented any compelling reasons justifying certiorari review of the Eleventh Circuit's qualified immunity ruling below in favor of Lieutenant Della-Calce. Accordingly, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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